1976

Richard Madsen and Nancy A. Madsen v. Prudential Federal Savings & Loan Associations : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD MADSEN and NANCY A. MADSEN, his wife,	)	
Plaintiffs-Appellants,	)	Case No. 14550
vs.	)	
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION,	)	
Defendant-Respondent.	)	

RESPONDENT'S BRIEF OF NEWLY UNCOVERED CASES

Pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure, respondent submits the attached pages of newly uncovered cases for insertion in the brief of respondent, all cases applying to Point III of respondent's brief.

DATED this 5 day of November, 1976.

MOYLE & DRAPER

By _____
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Brooks v. Valley National Bank (Sup.Ct. of Ariz., April, 1976), 548 P.2d 1166 ("Brooks II"), supersedes the opinion of the Arizona Court of Appeals in Brooks v. Valley National Bank, 539 P.2d 958 (1975) ("Brooks I"), cited at page 31 of respondent's brief. Brooks II sustained the Superior Court's granting of motion to dismiss the action, as did Brooks I, holding: (a) a trust was not created for the impounded funds even though the words "in trust" were used in the mortgage documents, and (b) the bank was not unjustly enriched through use of the funds. The reasoning follows the opinion in Brooks I cited in respondent's brief. The concurring opinion in Brooks II reasoned that a trust was created because the bank received the funds to be applied to a particular purpose but, nevertheless, the dismissal of the complaint was still proper, saying:

> Brooks relies on the general rule of law that it is the duty of a trustee to protect the interests of the beneficiary of a trust by the exercise of reasonable care and diligence in the management of the trust property, Bulla v. Valley National Bank of Phoenix, 82 Ariz. 84, 308 P.2d 932 (1957), and the general rule that that trustee has a duty to invest the trust property so that it is made productive for the beneficiary. Restatement (Second) of Trusts, §181 (1959). Where, however, a rule of law might otherwise be applicable to an agreement, custom or usage may make such rule of law inapplicable. Williston, Law of Contracts, §648 (3rd ed. 1961).

The practice of requiring impound payments has existed since the early 1930's. In every instance, without exception, where a suit has been brought to compel payment of interest or the earnings on the investment of the impound funds, the lending institution has not paid the mortgagor for the use of the impound funds. Nor is there anywhere the slightest suggestion that the Valley National Bank or any lending institution ever paid for the use of impound funds.

While a few isolated instances will not prove a usage, one so firmly established for so many years nationwide should be controlling. A usage will be binding if it is uniform, long established, and so well known that it can be said that the parties contracted with reference to it and the failure to conform to it would be the exception. Cleveland etc. R.R. Co. v. Jenkins, 174 Ill 398, 51 N.E. 811. Nor is a usage invalid because its effect is different from a general rule of law.

> It is well settled that a trade usage which is contrary to a statute or which contravenes public policy is invalid and may not be invoked; but where a rule of law is of a character that the parties may make it inapplicable to their contract by express agreement, they may likewise render it inapplicable by implied usage or by usage." Wolfe v. Texas Co., 83 F.2d 425, 431 (10th Cir. 1936).

I am therefore of the opinion that by banking usage neither interest nor earnings on investment was expected to be credited to the mortgagor.

A not-yet-reported decision is Throp v. Bell Federal Savings & Loan Assoc., Ill.App.Ct., Docket No. 60252, decided July 26, 1976, aff'd on rehearing, 10-7-76.

It affirmed granting of defendant's motion to dismiss of plaintiff's claim for earnings on the escrow funds, saying "the use or non-use of the words 'in trust' is not the controlling criteria as to whether an express trust has or has not been created." It is the most recent decision on the subject and contains a review of recent authorities similar to other cases cited in respondent's brief. Its reasoning is applicable to appellants' simplistic argument as to use of the word "pledge" in the mortgage document.

Finally, we cite the Report of Committee on Real Estate Financing entitled "Class Actions Under Antitrust Laws on Account of Escrow and Similar Practices," Real Property Probate and Trust Journal of the American Bar Association Section of Real Property, Probate and Trust Law, Volume 11, No. 2, Summer, 1976. It concludes:

> If lenders begin to pay interest on escrow accounts, realistically the additional expenses that result will in some manner be borne by borrowers either by a carrying charge or increase in the loan rates which would cover these expenses. In short the payment of interest on escrow accounts would not result in any economic benefit to borrowers and would in all probability increase costs at least on smaller loans.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 1976, two true and correct copies of the foregoing Respondent's Brief of Newly Uncovered Cases were delivered to Robert J. DeBry, attorney for plaintiffs, 2040 East 4800 South, Salt Lake City, Utah.